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Supreme Court of the United States

October Term, 1943

No. 894

WALTER JUDSON LUNDGREN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND FOR EXTENSION OF TIME

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Supreme Court of the United States

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No.....

WALTER JUDSON LUNDGREN,
Petitioner and Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND FOR EXTENSION OF TIME

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petitioner was indicted by the United States District Court grand jury at Phoenix, Arizona, on a charge

of failing to report for final type physical examination under the Selective Training and Service Act of 1940, Section 311 Title 50 United States Code Annotated. The indictment recites that petitioner "knowingly, wilfully, unlawfully and feloniously" failed to so report (T. R. 2). The petitioner was tried before a jury after a plea of not guilty, found guilty by the jury, and sentenced under a judgment entered on the jury's verdict to three years imprisonment. (T. R. 11-15)

The examination was set for the purpose of determining the physical fitness of petitioner for assignment to work of national importance under the provisions of said act. Petitioner testified at the trial that he would not perform any such work regardless of what the outcome of the examination might ue, because of his religious restraint or belief which he insisted required him to be neutral in the present war, he believing that any other attitude by him would subject him to the certainty of eternal death, non-existence forever, as to his body and his soul, all as set forth in the Bible, Hebrews Chap. 6, Verses 4, 5, 6, and Ephesians Chap. 6, Verse 12. (T. R. 38, 46, 86, 89, 93, 94)

Petitioner had been placed by his Local Board in Class IV-E, conscientious objector status. He did not appeal from the decision of the Local Board. He asked the Local Board to classify him IV-D, ordained or regular minister status, which request was refused. In his claim for exemption as an ordained or regular minister he relied on statements made in the usual conscientious objector claim form setting forth part of his religious beliefs. See the Government's exhibit No. 4 introduced in evidence at the trial. (T. R. 82, 83, 84, 85, 25, 26, 27.)

At the trial petitioner offered to testify that he was in fact a regular and an ordained minister within the meaning of the act, and other testimony and documentary evidence to this effect was offerred, and this evidence was rejected by the court and held to be immaterial. Exceptions to the rulings were duly made. (T. R. 27, 37, 28, 29, 30, 91, 92, 95.) T. R. 47, 48, 49, 50.)

At the trial the petitioner offered and was ready to testify as to what he thought would happen to him in the event that he should co-operate with the government in the war effort in any manner, and the court rejected this offer, the testimony was not given, and the proper exceptions were timely and duly taken. The trial court held that such evidence was immaterial. (T. R. 93, 38, 39, 88, 43, 44, 101, 87, 86.)

The trial court held that it was immaterial what would happen to petitioner or what petitioner thought would happen to him in the event of his co-operation with the government in the war effort and that THE ONLY ISSUE IN THE CASE WAS WHETHER THE PETITIONER DID OR WHETHER HE DIDN'T REPORT FOR THE PHYSICAL EXAMINATION. (T. R. 43, 38, 88, 86, 85, 47, 46.)

The trial court failed to instruct the jury on the question of feloniousness, criminal intent, and refused to give to the jury any of the instructions requested by petitioner, two of which were on this phase of his defense. The theory of the defense was lack of feloniousness or unlawfulness arising out of that lack of criminal intent which in turn was due to the religious fear or restraint actuating the failure to report for examination. (T. R. 31, 37, 50, 56, 55, 101, 30.)

The other theory of defense was self defense—defense of the chance which petitioner thinks he has for eternal life, or defense of his life throughout eternity. He believes that this chance will be forever lost if he co-operates with the government in the war effort. He was denied the opportunity to testify as to these matters by the rulings of the court duly excepted to. T. R. 44, 43, 42.

The court refused the petitioner's proffered instructions covering the question of entitlement to exemption as an ordained or regular minister. Evidence offered along this line would have tended to prove lack of felonious intent and/or unlawfulness in the mind of petitioner in failing to report for the examination. Timely exceptions were taken to the rulings or rejections, after due offer to prove the ordination and the regular minister status. (T. R. 27, 28, 29, 30, 32-37, 95, 91 ,92, 45, 46, 49, 48, 56, 101.)

Throughout the trial and on the appeal to the said Circuit Court of Appeals the petitioner has contended at all times that in failing to report for the physical examination he was freely exercising his religion as guaranteed by Article I, amendments to the United States Constitution; that his right to testify to his theory of defense, absence of criminal intent or feloniousness and of unlawfulness guaranteed by Articles 5 and 14 of the Amendments to the Constitution of the United States in the due process clauses, has been unconstitutionally denied him.

Petitioner has advanced the principle of law of self defense as applicable to the facts of this case. A defendant who fails to co-operate with government BECAUSE HE BELIEVES THAT IT MEANS THE LOSS OF IMMORTALITY, even to the extent of refusing to take human life, should be allowed the legal defense which in all the courts of the land permits the TAKING OF HU-

MAN LIFE when the defendant is in fear of losing his mortal life. Constitution of the United States, Article I Amendments fully justifies this extension of the law of self defense to such a situation as this, since it guarantees the free exercise of religion. The inherent powers of the courts to re-define all defenses to apply to new situations should also be sufficient authority of the Court herein to so extend the law of self defense.

Appeal was taken from the judgment of the District Court to the said Circuit Court of Appeals; briefs were filed before said appellate courrt; the case was argued February 14, 1944, and on that date judgment of the District Court was affirmed; petition with brief for a rehearing was filed, and said petition was denied on March 17, 1944; petitioner is at liberty under bond; issuance of mandate on said judgment of affirmance has been stayed by said appellate court until April 18, 1944, and until the United States Supreme Court passes on this petition for certiorari in the event this petition shall be docketed in said Supreme Court.

Bill of exceptions signed by the trial judge recites that due to the fact that the only issue in the case was whether defendant did or did not report for the physical examination as charged, and that all other matters were immaterial, and that no matter what answer the defendant might give to questions not bearing on this one issue, his answers would be immaterial, NO OFFER TO PROVE THE FACTS ELICITED WAS NECESSARY. (T. R. 43, 44.)

Petitioner requests an extension of time in which to file and serve upon the Solicitor General at Washington, D. C., supplemental brief in support of this petition for

certiorari. The said Circuit Court of Appeals has mailed to the Clerk of the Supreme Court, for filing, ten (10) copies of the record as required by paragraph 7, rule 38 of said Supreme Court; the petition for rehearing filed in the said Circuit Court of Appeals was denied March 17, 1944, and the time for filing this petition for certiorari expires at the close or end of April 21st, 1944. (For rule see 54 Sup. Ct. Peporter xxxix.)

STATEMENT AS TO JURISDICTION

Petitioner contends that this Supreme Court of the United States has jurisdiction to review the judgment and sentence in this action under the provision of: Section 240 Judicial Code, (Title 28, Sec. 347 United States Code Annotated) governing certiorari; Title 28, Section 350 United States Code; Rules numbers 12 and 38 of said Supreme Court; Rules of said Supreme Court promulgated May 7th, 1934, for Criminal Cases; Section 2, Article 3, Constitution of the United States; Section 311 Title 50, United States Code Annotated, the penal clause of the Selective Training and Service Act; Article I amendments to the United States Constitution; Articles V and XIV amendments to the U. S. Constitution, as to the due process of law clauses thereof.

For a similar case relied upon for supporting this jurisdiction, see Nick Falbo vs. United States recently decided, 88 L. Ed. 248.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I

The decision of the said Circuit Court of Appeals for the Ninth Circuit, denying admissibility of evidence and/or testimony on the question of criminal intent, feloniousness, and unlawfulness of the act charged is in conflict

with the decision of the Circuit Court of Appeals for the Second Circuit on a similar matter, in the case of United States vs. Hoffman, reported in 137 Fed. (2nd) 416, 419.

2.

The decision of the said Circuit Court of Appeals for the Ninth Circuit sanctioning the denial by the lower court of the giving of testimony by petitioner as to what he believed would happen to him in the event that he should co-operate with the government in the war effort, is a decision of an important question of local law in a way probably in conflict with applicable local decisions.

3.

The decision of the said Circuit Court of Appeals for the Ninth Circuit sanctioning the denial by the lower court of any right in petitioner to testify as to what he believed would happen to him in the event he should co-operate with the United States in the war effort, involves an important question of federal law, to-wit: The construction and application of the Selective Training and Service Act and the Constitution of the United States.

4.

The decision of the said Circuit Court of Appeals for the Ninth Circuit in sanctioning the rulings or decisions of the lower court rejecting the evidence and testimony offered on behalf of the petition at the trial and tending to show petitioner to be under religious restraint or prohibition restraining or preventing him from complying with the literal requirements of the Selective Training and Service Act constitutes a depriving the petitioner of his constitutional right to testify on his own behalf as guaranteed by the amendments Articles V and XIV of the Constitution of the United States in the due process clauses

thereof, and a denial to petitioner of his right to the free exercise of his religion as guaranteed by Article I amendment to the said Constitution.

5

The decision of the said Circuit Court of Appeals for the Ninth Circuit in upholding the decisions or rulings of the lower court rejecting evidence, testimony, and instructions requested by petitioner, tending to show and explain his theory of defense as being lack of criminal intent, lack of feloniousness, wilfulness and/or lack of unlawfulness in the failure to report for the examination so far departs from the accepted and usual course of judicial proceedings or so far sanctions such departure by a lower court as to call for an exercise of the Court's power of supervision herein.

6

The great importance of the Selective Training and Service Act of 1940 involved herein, to all the people of the United States and the need of an authoritative and elucidating decision as to the matters mentioned above herein; and as to the extension of the right of self defense or the re-defining of the law of self defense so as to include and extend the benefits of such defense to those who fear that they will suffer eternal death, non-existence, in the event that they co-operate with the government in the carrying on of war. See: Bible, Hebrews Chap. 6, verses 4, 5, 6; Ephesians, Chap. 6, Verse 12.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of

said Circuit Court had in the case number and entitled on its docket No. 10480, Walter Judson Lundgren, Appellant, vs. United States of America, Appellee, to the end that this case may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the court, and for such further relief as to this court may seem proper.

Dated April....., 1944.

WALTER JUDSON LUNDGREN, Petitioner

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